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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-610

JAMES W. CADE,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

F. LEE BAILEY
One Center Plaza
Boston, Mass. 02108
Counsel for Petitioner

GERALD ALCH
One Center Plaza
Boston, Mass. 02108
JOHN A. DALY
One Center Plaza
Boston, Mass. 02108
FALCON B. HAWKINS
141 East Bay Street
Charleston, South Carolina 29401
Of Counsel for Petitioner

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UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner James W. Cade respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceedings on August 14, 1973.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court of South Carolina at Charleston.

Jurisdiction

The judgment of the Court of Appeals for the Fourth Circuit was entered on August 14, 1973. A timely petition for rehearing was denied on September 7, 1973, and this petition for certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether a defendant's expressed attitude of not caring if the vehicles were stolen so long as they were delivered with the necessary papers is sufficient to meet the statutory requirement of "knowing the same to have been stolen".

2. Whether a defendant charged with the violation of a federal criminal statute which has a knowledge requirement can be denied his right to introduce the content of a conversation with a public official for the purpose of demonstrating his state of mind.

Statutory Provisions Involved

UNITED STATES CODE, TITLE 18:

§2313. Sale or receipt of stolen vehicles

> Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Statement of the Case

On November 14, 1972, the petitioner, James William Cade, was placed at the bar for trial before the Honorable J. Robert Martin, Jr., and a jury, in the United States District Court for the District of South Carolina, Charleston Division. The indictment contained 18 counts. Counts 2, 4, 6, 8, 10, 14, 16 and 18 charged the petitioner and his uncle Jimmie C. Cade, with receiving, concealing, storing, bartering, selling or disposing of certain motor vehicles, known by them to be stolen, moving in interstate commerce. Counts 1, 3, 5, 7, 9, 11, 13, 15 and 17 charged one Leonard Long or one Sherwood Watts or both with having transported, or causing the transportation of, said certain motor vehicles, known by them to be stolen, in interstate commerce. Before trial Leonard Long pleaded guilty to Count 17 and Sherwood Watts pleaded guilty to Count 15. The petitioner was tried jointly with said Jimmie C. Cade.

The prosecution's case was essentially as follows:

> Petitioner James W. Cade was primarily engaged in a business partnership with one Walter Bogart. They had been in business for three and one-half years and the business appeared to be prospering.

Another indicted in the instant case was petitioner's uncle, Jimmie C. Cade. James and Jimmie owned and operated a used car lot in Charleston, South Carolina.

Several years ago James and Jimmie had occasion to meet one Leonard Long and one Sherwood Watts, the other two people primarily involved in the instant indictment. At that time Long was engaged in an automobile repair business in Charleston and his brother-in-law Sherwood Watts was an employee in said business. Both earned their livings repairing automobiles. Said meeting was oc-

casioned by the fact that Cade Auto Sales brought several cars to Long's shop to have them repaired.

Sometime late in the year 1970 Sherwood Watts moved to Detroit, Michigan, where he became an employee in an automobile repair shop known as Fools Gold Custom. Watts communicated with Long and advised him that used automobiles were "cheap" in Detroit.

Long journeyed to Detroit in February or March of 1971. During the following month or so he and Watts purchased a number of automobiles from Fools Gold Custom and subsequently transported said automobiles to Charleston, South Carolina, where they sold them to either James or Jimmie Cade or Cade Auto Sales.

At trial, the prosecution established that the automobiles in question had a vehicle identification number (VIN) in three different places. The first was described as a *public* VIN which was readily accessible. The second was a VIN punched in a plastic warranty plate and located by the door. The third was identified as a *confidential* VIN, the location of which was known only to the Federal Bureau of Investigation and the National Auto theft Bureau.

Of the automobiles that Long and Watts had transported and sold to the Cades, seven were identified as having been stolen from the Detroit, Michigan area. Each of said seven automobiles had had the *public* VIN and the VIN on the plastic warranty plate altered in such a manner that it would take an expert to note the alteration.

Sometime in March, 1971, Long and Watts drove a 1971 green Cadillac to Cade Auto Sales and asked Jimmie if he would be interested in buying it. Present at the time was one Turbeville who was a general manager of a bank and who was going to finance said Cadillac for Jimmie. Long had a Bill of Sale reflecting that Long owned the Cadillac. The Cades asked Watts and Long if the car was stolen.

Long's reply was "not that I'm aware of". The Cadillac gave the appearance of having been a wrecked or salvaged automobile, and Long represented that he purchased the car at a body shop and that he believed that the car had been wrecked and repaired.

Long further represented that he had been told by his seller that title to the automobile would be mailed to him from Lansing, Michigan, and that when he received same he would give it to the Cades.

The appellant then called the responsible agency in Lansing, Michigan, to determine whether Long in fact had good title to the vehicle.

The Cades and Long initially haggled over the price and Jimmie finally purchased the car for $5,000.

Subsequently, this particular automobile was purchased by one Henry Niles from Cade Auto Sales on or about March 30, 1971 for a trade-in and cash, the total value of which was 6,500. When Niles purchased the car the Cades did not yet have the Certificate of Title. When the Cades did receive the Certificate, Niles took receipt of it and checked the VIN contained thereon with the public VIN on the automobile. Two numbers had been inverted. Jimmie and Niles went to the Highway Department and checked the discrepancy with a Sergeant Griffin. Griffin checked the public VIN on the car with the VIN on the Certificate and assured Niles that it was merely a typographical error and that everything was in order. Two or three weeks later someone told Niles the car was stolen. Jimmie and Niles went to the County Police Department where a Captain Gayward checked the public VIN on the automobile with the International Crime Information Center in Washington, D.C., Niles was again assured that the car was not stolen.

The order of events that followed the purchase of the first automobile are somewhat confused in the trial tran-

script; however, it appears that at some time the Cades told Watts that they wanted all the cars they could get, preferably new Lincolns and Cadillacs; that the Cades told Watts and Long that they didn't care whether the cars were stolen as long as they had proper documentation for them, to which Long testified that "I didn't think much about it myself actually"; that the Cades had received from and made calls to Watts and Long at Fools Gold Custom in Detroit, Michigan; that Watts did not have a telephone in his home in Michigan and that the telephone number of Fools Gold Custom was given to the Cades by Long; that the Cades had telephoned Long at his home; that the Cades had been to Long's home; that after the first car the Bills of Sale and Certificates of Title were in the names of either James or Jimmie; that after Long bought the second car Jimmie and Long went to the Highway Department and got two sets of dealer plates and two registration cards to be used in transporting the cars from Michigan to South Carolina; that Long at least on one occasion attempted to sell the cars to someone other than the Cades; that James did not spend much time at the lot.

Long and Watts each testified that neither of them ever told the Cades that they obtained the automobiles at Fools Gold Custom or how much they paid for them. Although Watts had been told in Detroit before delivery that the last car he delivered was stolen, he did not communicate that information to either of the Cades and although Watts told Long before the transportation of the last two cars that he believed the cars were stolen, Long never communicated said belief to either of the Cades; that the Cades had asked Long on several occasions if these automobiles were stolen, to which Long replied with statements to the effect of "not that I know of" or "not to my knowledge".

The second car sold to either of the Cades was a 1971 white Cadillac Coupe DeVille (subject automobile of Count 4). Long had purchased it at Fools Gold Custom and at the direction of the Cades had taken title to it in the name of James W. Cade. The Cades again asked Long several times if there was anything wrong with these cars, to which Long stated "not to my knowledge". Long "sold" the car to the Cades for $5,000.

This particular automobile was subsequently purchased from Cades Auto Sales by Bobby Miles for $5,900 in March of 1971. At that time it had four or five thousand miles registered on the speedometer. Miles testified that the left side of the automobile appeared to have been wrecked and repaired and that after having purchased the car Miles put the key in the left door lock and when he pulled the key, the lock came with it. When Miles purchased the car he received a Certificate of Title, a Bill of Sale, and a Registration Card. The Certificate of Title was issued by the State of Michigan in the name of James Cade.

The transcript is confusing as to who brought the next car to Cades Auto Sales and when. Therefore, for purposes of clarity, we shall deal with each automobile in the order of the Counts on which the appellant was convicted.

Count 6 deals with a 1971 Thunderbird which was purchased by Long in Detroit and sold to James Cade for $3,000. This automobile was stolen in Michigan on April 22, 1971 and recovered by the FBI on April 27, 1971, at which time the speedometer registered 6,445 miles. The true owner had purchased the automobile as a demonstrator in early April, 1971, for the sum of $5,500.

The next Count upon which the petitioner was convicted was Count 8, the subject automobile of which was a 1971 dark brown Lincoln Mark III which was apparently the

fourth car that Long sold to the Cades. Long sold it to the Cades for $5,000. James Cade sold this particular car to a Walter Bogart for $5,500 during the second week in April, 1971. The automobile had 12,000 miles registered on the speedometer at the time of the purchase. Bogart did not receive any documentation with the car. A James D. Quinn testified that in April of 1971, he had test-driven a brown Lincoln Mark III from Cades Auto Sales and noticed a minute little scratch around the public VIN plate and an extra set of keys in a magnetic box under the hood that did not fit the car.

These circumstances made him suspicious. When he returned to the lot James was not present. He mentioned the extra set of keys at that time to "anybody that was listening." Quinn asked about documents for the car and he was told by an unidentified source that the car had a Detroit title and that Cades Auto Sales would have it in a few days.

The next Count upon which the petitioner was convicted was Count 12, the subject automobile of which was a green 1971 Lincoln Continental Mark III. Watts transported and sold this particular automobile to the Cades for $4,500. It had been stolen from the Detroit area on or about April 1, 1971. Watts also delivered documents with the vehicle reflecting James or Jimmie Cade as the owner. A Thomas Daniels subsequently purchased this particular vehicle for $5,000. The speedometer registered 4,430 miles. At the time of purchase Daniels was provided with a Bill of Sale and a Certificate of Origin. Subsequently he received a Certificate of Title. The public VIN was the same number reflected on the Bill of Sale, the Certificate of Origin, and the Certificate of Title.

The last Count upon which the appellant was convicted was Count 14 which dealt with another 1971 green Lincoln Continental Mark III. This was apparently the third auto-

mobile transported and sold by Long to the Cades. Long testified that he sold this particular vehicle to the Cades but the price was never asked for by counsel for either side during the prosecution case, nor were any witnesses asked whether there were any documents pertaining to this particular vehicle.

At the close of the prosecution's case the Government nol-prossed Counts 10 & 18. Petitioner moved for directed verdicts of acquittal on Counts 2, 4, 6, 8, 12 and 14. The Court granted petitioner's motion with respect to Count 2 only.

When passing on the remaining counts the Court stated its basis for denial as follows:

> ". . . if believed you have got the testimony of both Long and Watts the reasonable inference to be drawn therefrom being that they didn't care whether they were stolen or not as long as they could bring them at the right price and had the proper licensing from title standpoint of Michigan, *which in itself,* without the other circumstances is probably enough to carry them to the jury I'm afraid." (emphasis added)

Petitioner's case was essentially as follows:

Jimmie Cade had had extensive experience in the used car sales business. James and Jimmie Cade entered into a business agreement whereby James agreed to financially back and Jimmie agreed to run a used car sales business. Cade Auto Sales had no repair facilities at the lot which necessitated sending any cars in need of repair to someone else's facility.

James testified that when Leonard Long first offered to sell Jimmie the 1971 green Cadillac he called the Motor Vehicle Registration and Title Department in Lansing, Michigan, to establish that Leonard Long in fact had

title. Subsequently defense counsel sought the Court's premission to inquire into the content of the conversation with said Department. The Court denied counsel its permission and preserved his rights on appeal.

The Bill of Sale for the subject automobile of Count 12 from James Cade to Thomas Daniels was signed by James and dated April 2, 1971. The statement of origin for said automobile reflected that it had been manufactured on March 17, 1971, and transferred to Cade Auto Sales on March 24, 1971.

In rebuttal the Government introduced evidence to the effect that a 1971 Lincoln Continental had been registered to Jimmie C. Cade in South Carolina as a new car and bearing VIN 1Y89A813315.

The jury returned verdicts of guilty as to both petitioner and said Jimmie C. Cade on Counts 4, 8 and 12, as to solely the petitioner on Counts 6 and 14, and as to solely said Jimmie C. Cade on Count 16. The jury returned a verdict of not guilty as to the petitioner on Count 16 and verdicts of not guilty as to said Jimmie C. Cade on Counts 6 and 14. On November 17, 1972, a judgment of conviction was entered and on January 2, 1973, the Court imposed sentence on the petitioner of 4 years on each of Counts 4, 6, 8, 12 and 14 to be served concurrently.

Petitioner timely filed his appeal to the United States Court of Appeals for the Fourth Circuit basically contending that the trial court erred by 1) relying upon statements attributed to the petitioner to the effect that "he did not care whether the cars were stolen or not as long as they could bring them at the right price and had the proper licensing . . ." as being sufficient to submit the matter to the jury, and by 2) refusing to admit the

content of a conversation petitioner had with a public official which would tend to establish petitioner's state of mind with respect to the legitimacy of the ownership of the automobiles.

With respect to 1) above, the Court of Appeals opined that the expressed attitude of "not caring whether the cars were stolen or not . . ." was tantamount to an attempt to insulate himself from acquiring the requisite knowledge for conviction and that "*to hold that a person lacked a requisite knowledge to sustain a criminal conviction because he deliberately sought to insulate himself from acquiring this knowledge would be a gross distortion of the criminal law.*" (App. A. 27) (emphasis added)

With respect to 2) above, the Court of Appeals did not determine whether said evidence was admissible but held that your petitioner was not prejudiced by the judge's ruling. Accordingly, the judgment of the district court was affirmed.

Reasons for Granting the Writ

I. The Decision Below Raises an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by this Court and that Question Is Whether a Defendant's Expressed Attitude of Not Caring About a Certain Fact Is Sufficient to Meet a Statutory Requirement for Criminal Responsibility of *Knowing* that Certain Fact.

The Dyer Act conclusively demands knowledge of the defendant in order for a conviction to stand:

> "Whoever receives, conceals, stores, barters, sells or disposes of any motor vehicle . . . *knowing the same to have been stolen*, shall be fined not more than $5,000

> or imprisoned not more than five years, or both." 18 USC §2313 (emphasis added)

Time and again courts have reaffirmed the notion that knowledge of the stolen character of the automobile is an "essential element" of the offense charged. *See, e.g. U. S.* v. *Chitwood,* 457 F.2d 676 (Sixth Circuit, 1972); *U. S.* v. *Gardner,* 171 F.2d 753 (Seventh Circuit, 1948).

When passing on the motions for a directed verdict of acquittal on the government's case, the trial court relied exclusively on the petitioner's expressed attitude of not caring whether the automobiles were stolen or not as long as they had the proper licensing. This is evidenced by its statement that

> "* * * if believed you have got the testimony of both Long and Watts the reasonable inference to be drawn therefrom being that they didn't care whether they were stolen or not as long as they could bring them at the right price and had the proper licensing from title standpoint of Michigan, which in itself without the other circumstances is probably enough to carry them to the jury I'm afraid."

Said inference is drawn from statements to that effect attributed to the petitioner.

It is clear — as a matter of both law and logic — that the statement falls far short of meeting the statutory test of "knowledge".

However, equally as clear, the court of appeals supported the trial court's error and compounded it by opining that the statement was an attempt to insulate himself from acquiring the requisite knowledge for conviction and that "to hold that a person lacked a requisite knowledge to sustain a criminal conviction because he deliber-

ately sought to insulate himself from acquiring this knowledge would be a gross distortion of the law." (App. A. 27) In support of its opinion the court of appeals directs our attention to the case of *United States* v. *Carrier,* 344 F.2d 42 (4th Cir. 1965). In that case Carrier was indicted and convicted under 18 U.S.C. §2113 for knowingly and wilfully receiving, relieving, comforting, and assisting a fugitive in order to hinder and prevent his apprehension for trial and punishment. By Carrier's own admission he *knew* that the fugitive was wanted by the authorities for bank robbery. The sole issue in that case was *intent* and not an attitude of *not caring.* It is respectively suggested that the Court of Appeals is without legal precedent to support its statement.

This court must not allow the government to play fast and loose with the express terms of a severe criminal statute. If Congress had wanted to include "reckless disregard" in the statute, it would have been a simple enough matter for them to achieve. Yet the statute relies on the word "knowing"—and it cannot be over-emphasized that this statute, like all criminal statutes, should be strictly construed (see *Murphy* v. *U. S.*, 206 F.2d 571 [Fifth Circuit, 1953]) and an item such as the one at bar "commonly imports a *perception* of the facts requisite to make up the crime". *Commonwealth* v. *Altenhaus,* 57 NE 2d 921, 922 (Massachusetts 1944); cf. *Standard Oil Co.* v. *U. S.,* 307 F.2d 120 (Fifth Circuit, 1962).

To hold that petitioner's comment here is the legal equivalent of statutory "knowledge" would thus wreak havoc with the draftsman's clear intent. Surely, such a result would imply that jurors should decide *for themselves* whether or not the petitioner really had—*or should have had*—knowledge that the car was stolen. That very proposition has been totally discredited by the Court of Appeals for the Fourth Circuit:

> "* * * The district judge's comment that defendant 'knew or should have known' that the automobile was stolen was, we think, merely an inexact way of expressing his appraisal of the evidence as establishing guilt beyond a reasonable doubt. Had it occurred in a trial to a jury we would be concerned, for the proper test is, of course, not whether Dunn should have known the vehicle was stolen, but whether he knew it was."

U. S. v. *Dunn*, 418 F.2d 245 (Fourth Circuit, 1969) *cert. denied* 397 U.S. 361 (1969).

The knowledge standard can only be an objective one, but not a subjective "reasonable man" test. See, e.g., *Kasle* v. *U. S.*, 233 F. 878 (Sixth Circuit, 1916); *Pounds* v. *U. S.*, 265 F. 242 (Seventh Circuit, 1920); *Stemple* v. *U. S.*, 287 F. 132 (Fourth Circuit, 1923); *Petersen* v. *U. S.*, 213 F. 920 (Ninth Circuit, 1914); *State* v. *Hamilton*, 164 SE 639 (S.C. 1932).

The term "knowing" in the statute can mean but one thing—*actual* knowledge. Thus, the caveat that the requisite knowledge can be inferred from circumstantial evidence means only that a jury can piece evidence together and *infer* that an appellant *had* knowledge. Here, no such process is in question; for, here, there is no circumstantial evidence that might lead one to conclude that appellant actually knew that the car was stolen. There is, merely a hearsay statement that appellant stated, in effect, that he did *not* know the car was stolen, but didn't care. Nothing could be further from actual knowledge.

The so-called "close cases" that hold that the appellant had knowledge by inference are virtually unanimous in their use of the "actual knowledge" standard. *See, e.g., United States* v. *Smith*, 461 F.2d 246 (Tenth Circuit, 1972) (vehicle in defendant's possession had stolen plates; defendant couldn't identify the "seller", and bragged about

stealing the vehicle.); *Kramer* v. *United States*, 408 F.2d 837 (Eighth Circuit, 1969) (defendant claimed he believed another party, whom he could not identify and only his wife had "seen", owned the car); *Pilgrim* v. *United States*, 266 F.2d 485 (Fifth Circuit, 1959) (bill of sale was made out by the defendant who was unable to identify the seller); *United States* v. *McCurry*, 248 F.2d 116 (Third Circuit, 1957) (defendant paid a much lower price than "fair price" for the cars); *Schwachter* v. *United States*, 237 F.2d 640 (Sixth Circuit, 1956) (false bill of sale; material difference in market price and sale price); *United States* v. *Bucur*, 194 F.2d 297 (Seventh Circuit, 1952) (defendant sought additional papers so that subsequent buyer would not think car was stolen.); *Powell* v. *United States*, 410 F.2d 710 (Fifth Circuit, 1969) (the price the defendant paid for the car was low; the car had no identification or ownership papers at the time of the sale; the defendant had acquired a wrecked car and transferred its plates to the new purchaser and the new car was repainted); *Saunders* v. *United States*, 416 F.2d 194 (Fifth Circuit, 1969) (when defendant asked if car was stolen, other party held a gun to his head and told him to "keep quiet" about the car).

Furthermore, it can hardly be said that petitioner's statement here could reasonably give rise to an inference that he actually knew the car to be stolen. For one thing, there is no logical reason why such a statement would be made if petitioner knew of the theft; and in any case, the *inference itself* must be proved by substantial evidence. It is surely not enough that such an inference is within the range of possibility. *United States* v. *Delay*, 440 F.2d 566 (7th Cir. 1971).

A close examination of the remaining evidence supports petitioner's contention that the prosecution's case fell far short of reaching the mark necessary to establish facts upon which the jury could find beyond a reasonable doubt

that the petitioner had actual knowledge. No direct evidence of said knowledge had been presented. On the contrary, we have direct evidence to show that they did not have knowledge of the fact that the automobiles were stolen by the statements of the Government's own witnesses Long and Watts to the effect that they never told the Cades that they got the automobiles at Fools Gold Custom; or how much they paid for them; or that they knew or believed that the automobiles were stolen; and that when directly asked by the Cades if the automobiles were stolen they made statements to the effect of "not to my knowledge" or "not that I'm aware of."

Although evidence of a person's state of mind is usually circumstantial, *U. S.* v. *Chitwood*, supra, P. 679, a close examination of the circumstances presented suggests that the inferences to be drawn are equally as consistent with a theory of innocence as with a theory of guilt. The petitioner had recently taken possession of stolen automobiles and "possession of property recently stolen, *if not satisfactorily explained*, is ordinarily a circumstance from which the jury can draw the inference and find . . . that the person in possession knew the property had been stolen." *Jones* v. *United States*, 378 F.2d 340, 341 (Ninth Circuit, 1967) (emphasis added). However, such possession gives rise only to an *inference* and not a presumption. In the case of *Rogers* v. *U. S.*, 402 F.2d 830 (Ninth Cir. 1968) the Court held that the fact that the petitioner had a Certificate of Title which checked with the VIN of the automobile was a sufficient "explanation" of his possession of the automobile. In the instant case the testimony adduced by the Government is to the effect that when Long and Watts first appeared at the used car lot seeking to sell the 1971 green Cadillac the petitioner was suspicious, especially in light of the fact that Long was unable to produce a Certificate of Title. He took the best course

of action possible; he called the Motor Vehicle Registration and Title Department. It was not until after the Cades had purchased the car and resold it that the Certificate of Title came into their possession. During the course of the next several weeks questions arose as to the legitimacy of the same vehicle. Again, the Cades took the best course of action. They took the car and its documents to the Highway Department and the County Police. The assurances there obtained would surely have quieted the most suspicious of minds and must have been sufficient to the Trial Court to "explain" the appellant's possession of that particular automobile in that the Court dismissed Count 2 on the same motion which is now the subject of the instant argument.

The first automobile purchased by the Cades for which the petitioner was convicted was the subject of Count 4 upon the Government's election of *selling*. This Count dealt with the second automobile sold to the Cades and it was sold to them shortly after the purchase of the first car. The only significant changes in the circumstances surrounding the sale of this particular automobile are as follows:

1. That Long had all necessary documents with him.
2. That the documents reflected the owner as being the petitioner.
3. That the petitioner and Jimmie Cade are attributed with having made a statement or statements to the effect that "we don't care whether the cars are stolen as long as they have proper documentation for them". A statement to which Long said he "didn't think much about it actually."
4. That during the interim period the Cades may

have telephonically communicated with Watts and/or Long in Detroit.

5. That the Cades had informed Watts and Long that they would take all the cars they could get.

The fact that Long had the requisite documentation upon delivery of the car merely amplifies the argument raised above with respect to the negating effect of apparently valid documentation on any inference to be drawn from the possession of recently stolen automobiles. The facts that the documents reflected the petitioner as the owner, that the Cades asked for all the cars they could get, and that the Cades had contacted either Watts and/or Long telephonically inquiring about cars and deliveries are just as consistent with good business judgment as with guilty behavior.

> "The inference that [defendant] sold cars which he thought were legitimate, is as strong as the inference that he sold cars knowing them to be stolen. Where the evidence is equally consistent with a theory of innocence as with a theory of guilt, that evidence necessarily fails to establish guilt beyond a reasonable doubt." *U. S.* v. *Delay,* supra, p. 568.

See also *Fitzpatrick* v. *U. S.,* 410 F.2d 513 (Fifth Circuit, 1969).

The second automobile purchased by the Cades for which the appellant was convicted was the subject of Count 12 upon the Government's election of *selling.* This automobile was transported and sold to the Cades by Watts. The only significant changes in the circumstances in the purchase or sale of this vehicle was that by this time the lock on the door of the subject automobile of Count 4 and fallen out

and the *apparent* legality of the ownership of the subject vehicle of Count 2 had been affirmed. No new inferences could be drawn sufficient to warrant a denial of the petitioner's motion for a directed verdict of acquittal as to Count 12.

The next automobile purchased by the Cades for which the petitioner was convicted was the subject automobile of Count 14 upon which the Government elected *receiving*. This vehicle was apparently the third vehicle transported by Long and sold to the Cades. The only significant changes in the circumstances established by the Government concerning the receiving of this particular vehicle was that it was after the receipt by Long of two registration plates and registration cards from Jimmie Cade. No counsel questioned any of the witnesses during the pendency of the Government's case as to whether Long had given any documents to the Cades pertaining to this particular vehicle.

The next automobile purchased by the Cades for which the appellant was convicted was the subject automobile of Count 8 on which the Government elected *selling*. This particular automobile was apparently the fourth car delivered by Long. Long sold it to the Cades for $5,000. James Cade then resold it to his business partner, Walter Bogart during the second week of April. The only significant variance in the circumstances was that the Cades did not receive any documentation on this vehicle nor did they convey any documents to Bogart. Taken alone that circumstance is damaging until the circumstances of the prior purchases are taken into consideration. The first car the Cades bought did not have the Certificate of Title at the time of sale, but they received it. The third car they bought did not have a Certificate of Title at the time of sale, but they received it. The fact that documents were received subsequent to the purchase and re-sale of two

of the first three automobiles received established a course of dealings sufficient to "explain" and overcome any inference which might be drawn from the lack thereof on this particular vehicle.

The last automobile purchased by the Cades for which the petitioner was convicted was the subject automobile of Count 6 on which the Government elected *receiving*. That was a vehicle delivered to the Cades between April 22, 1971 [the date the automobile was stolen] and April 22, 1971 (the date the automobile was recovered by the FBI). James Cade purchased the car for $3,000.00. The only change in circumstances was the fact that it had been several weeks since the purchase without documents of the subject automobile of Count 8. That circumstance may have been sufficient to raise a suspicion in the mind of the petitioner but it was clearly insufficient to infer knowledge therefrom.

The Government made a futile attempt to show that the monies paid by the Cades for the automobiles was ridiculously low by introducing the prices paid by the true owners for comparison with the prices paid by the Cades for the same automobiles. Such an approach flies in the face of reason. The prices paid by the Cades and to the Cades for these automobiles could only be properly compared with the fair wholesale and retail prices of automobiles of similar repair, number of owners, and warranties. Its attempt is no more valid than a comparison between apples and oranges and can only leave the trier-of-fact with a weak support, insufficient to bear the burden of reasonable doubt.

II. The Fact that the Court of Appeals Upheld a Clearly Erroneous Denial of a Right of an Individual Charged With Violation of a Federal Criminal Statute

WHICH REQUIRES KNOWLEDGE FOR CRIMINAL RESPONSIBILITY TO INTRODUCE THE CONTENT OF A CONVERSATION WITH A PUBLIC OFFICIAL TO DEMONSTRATE HIS STATE OF MIND SANCTIONS SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL RULES OF EVIDENCE AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Petitioner had testified that when the first automobile was presented to him for purchase he sought to determine whether it was stolen by calling the Michigan Bureau of Titles. Counsel sought the trial court's permission to inquire into the content of the conversation for the purpose of demonstrating petitioner's state of mind. The Court denied its permission stating "It violates every rule of evidence I've ever known."

Even if viewed as hearsay, courts have been quick to carve out an exception to the exclusionary rule for just this sort of statement. Petitioner's statement was offered solely to show state of mind; for that limited purpose, it was clearly admissible.

> "Declarations evincing a particular intent or intention are relevant in very many connections when the legal effect of an act or the animus with which it is done is to be determined; for example, to establish the intention with which goods . . . were received." 31A C.J.S. Evidence § 256; cf. 22A C.J.S. Crim. Law § 738.

Such an exception has been unequivocally recognized. *See, e.g., U. S.* v. *Grow*, 394 F.2d 182 (Fourth Circuit, 1968).

Frank v. *U. S.*, 220 F.2d 559 (Tenth Circuit, 1955) is strikingly similar to the case at bar. There, defendant

was charged with using the mails to defraud in the sale of securities for the drilling of oil wells. The government claimed that defendant fraudulently misrepresented a "magnetic logger" device, invented by defendant, which was the cornerstone of his scheme. The court of appeals, however, reversed his conviction on the ground that statements made to defendant by third parties that the device was effective were wrongly excluded at trial. The court correctly viewed such statements as admissible to show defendant's innocent state of mind in mailing the "misrepresentations".

Miller v. *U. S.*, 120 F.2d 968 (Tenth Circuit, 1941) is similarly instructive. There, too, securities fraud was charged. Defendant's offer of evidence that during a discussion he had innocently explained a certain statement on the Blue Sky application was excluded at trial. The Court of Appeals reversed, sharply criticizing the trial judge for his action:

> "Whenever the belief of a person or the motive of his act or conduct is material, he may not only directly testify that he had no intent to defraud, but he may buttress such statement with testimony of relevant circumstances, including conversations had with third persons or statements made by them, tending to support his statement that he had no intent to defraud. *Buchanan* v. *United States*, 8 Cir. 233 F. 257; *Gardom* v. *Woodward*, 44 Kan. 758, 25 P. 199, 21 Am. St. Rep. 310; *Potter* v. *United States*, 155 U.S. 438, 15 S. Ct. 144, 39 L. Ed. 214, *Hyde* v. *United States*, 4 Cir., 15 F.2d 816; *Sparks* v. *United States*, 6 Cir., 241 F.777." 120 F.2d at 970.

See also *Wigmore on Evidence*, § 1789 (3d. Ed.); *Haigler* v. *U.S.*, 172 F.2d 986 (Tenth Circuit, 1949), cf. *McDonald*

v. *U.S.*, 246 F.2d 727 (Tenth Circuit, 1957) *cert. denied* 78 S. Ct. 95 (1957). Furthermore, the mere fact that defendant's statement might be self-serving has been held in the past inconsequential, so long as it reflects on his state of mind. *U.S.* v. *Shavin*, 287 F.2d 647, 654 (Seventh Circuit, 1961); cf. *Crawford* v. *U.S.*, 212 U.S. 183 (1909); *U.S.* v. *Edwards*, 458 F.2d 875 (Fifth Circuit, 1972).

Indeed, the thrust of defendant's evidence was double-barreled; state of mind was essential not only to negative knowledge, but *intent* as well — another critical Dyer Act component. See, e.g. *Jones* v. *U. S.*, 378 F.2d 340 (Ninth Circuit, 1967). On both counts defendant's excluded evidence served a legitimate limited purpose.

Above all, by excluding this evidence, the trial judge effectively removed defendant's only avenue of defense. It is admitted that mere possession of a stolen car — such as petitioner had — gives rise to an inference that he knew the car to be stolen. *See, e.g., Overton* v. *U. S.*, 405 F.2d 168 (Fifth Circuit, 1968); *U. S.* v. *Costanzo*, 395 F.2d 441 (Fourth Circuit, 1968). Thus, the only way that defendant could possibly negative that inference was by showing that he did *not* know the car to be stolen, and did *not* intend to deprive the rightful owner of its use. It was precisely for that purpose, and that purpose alone, that petitioner offered evidence of the telephone call to Michigan. And it is that evidence which the trial court did not permit.

The sanction of such error by the Court of Appeals in its cavalier dismissal of this issue by holding that if it was error it did not prejudice your petitioner constitutes a departure from the accepted and usual course of judicial proceedings.

Conclusion

FOR THESE REASONS, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

F. LEE BAILEY
One Center Plaza
Boston, Mass. 02108
Counsel for Petitioner

GERALD ALCH
One Center Plaza
Boston, Mass. 02108
JOHN A. DALY
One Center Plaza
Boston, Mass. 02108
FALCON B. HAWKINS
141 East Bay Street
Charleston, South Carolina 29401
Of Counsel for Petitioner

October , 1973

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-1068

THE UNITED STATES OF AMERICA,
APPELLEE,
v.
JAMES WILLIAM CADE,
APPELLANT.

No. 73-1069

THE UNITED STATES OF AMERICA,
APPELLEE,
v.
JIMMIE CARL CADE,
APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA, AT CHARLESTON.
J. ROBERT MARTIN, DISTRICT JUDGE.

Submitted: May 7, 1973 Decided: August 14, 1973

Before RUSSELL, FIELD, and WIDENER, *Circuit Judges.*

F. Lee Bailey, *Gerald Alch*, *John A. Daly*, *(Bailey, Alch & Gillis)*, and *Falcon B. Hawkins* on brief for Appellant in No. 73-1068; *James A. Stuckey, Jr.*, on brief for Appellant in No. 73-1069; *John K. Grisso*, United States Attorney, and *Lionel S. Lofton*, Assistant United States Attorney, on brief for Appellee in both cases.

PER CURIAM:

James William Cade and Jimmie Carl Cade appeal from their convictions under a multi-count indictment of receiving and selling stolen motor vehicles which were moving in interstate commerce, with knowledge that these

vehicles were stolen, in violation of 18 U.S.C. §§ 2313 and 2. Both pled not guilty to all counts and were convicted after a trial by jury. They were initially charged with nine counts, but during trial one count was dismissed by the district court for lack of evidence, and two counts were dismissed upon motion of the Government. James William Cade was convicted on five of the remaining six counts, and Jimmie Carl Cade was convicted on four counts.

James William Cade complains that (1) the evidence was insufficient as a matter of law to establish that he had knowledge the vehicles were stolen, and (2) that the district court erred in refusing to admit certain evidence which allegedly would have supported his defense that he lacked knowledge. Jimmie Carl Cade raises only argument (2) above. We find no merit in these assignments of error and therefore affirm the judgment of the district court.

A verdict of guilty must be sustained on appeal "if there is substantial evidence, taking the view most favorable to the government, to support the findings of guilt." *United States* v. *Sherman* (4th Cir. 1970), 421 F.2d 198, 199.

The specific question in this case is whether there was substantial evidence to support the implied findings in the jury's verdict that James William Cade had knowledge the vehicles were stolen. "Generally, the requisite knowledge may be inferred by the finder of fact from proof of possession, which in this context is defined as actual control, dominion or authority." *United States* v. *Costanzo*, (4th Cir. 1968) 395 F.2d 441, 446.

Cade admits his possession of recently stolen automobiles and the inference which the jury is permitted to draw from such possession but contends the evidence rebutted this inference. We disagree. A review of the test-

imony indicates that not only was Cade given reason to believe the vehicles might be stolen, but also that there was evidence which, if believed, established that he informed his suppliers that he did not care if the vehicles were stolen so long as they were delivered with the necessary papers to permit their resale.

To hold that a person lacked a requisite knowledge to sustain a criminal conviction because he deliberately sought to insulate himself from acquiring this knowledge would be a gross distortion of the criminal law. *Cf.*, *United States* v. *Carrier*, (4th Cir. 1965) 344 F.2d 42.

The joint claim by the Cades that the district court improperly refused to admit certain evidence arose out of these facts. During his testimony James William Cade related the circumstances attending his and Jimmie Carl Cade's first purchase in the series leading to the indictments in this case. He testified that he called the Motor Vehicle Registration and Title Department in Lansing, Michigan, (the state where his seller had allegedly purchased the car) to verify that the car was not stolen. He then stated that after this telephone conversation he felt certain the car was not stolen.

Defense counsel made no attempt to question Cade concerning the content of his conversation with the Michigan authorities, but during a subsequent recess he stated to the court that "[i]t would be our position that we should be permitted to explore that conversation, not for what was actually said during the conversation, but to show Mr. Cade's state of mind at that time and for these other actions . . ." The district judge noted that the official involved was available to testify and ruled that the proposed testimony by Cade constituted inadmissible hearsay.

In a subsequent affidavit, Cade's attorney stated that Cade would have testified the Michigan official told him

the car was registered to the man who was offering it for sale (to Cade), that there were no liens against it, and that he would mail the title the following day. The Cades now argue that this testimony was admissible for the purpose of establishing that they did not have knowledge the automobiles they purchased and resold were stolen.

We note first that the count dealing with the particular automobile discussed in this conversation was dismissed for lack of evidence. The conversation was at most tangentially relevant to the question of knowledge with regard to the other six vehicles.

Even if this were not the case, however, we do not see how the Cades would have been prejudiced by the judge's ruling. James William Cade had already testified that after his conversation he was satisfied that the car was not stolen. Stating what the Michigan official said that made him satisfied, would not have added to the strength of this evidence for the purpose of establishing a lack of knowledge this car was stolen.

Accordingly, we dispense with oral argument, and affirm the judgment of the district court.

Affirmed

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
Filed Sept. 17, 1973
No. 73-1068

THE UNITED STATES OF AMERICA,
APPELLEE,
v.
JAMES WILLIAM CADE,
APPELLANT.

JUDGMENT

Appeal from the United States District Court for the District of South Carolina.

This cause came on to be heard on the record from the United States District Court for the District of South Carolna.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

Filed: Aug. 14, 1973

(s) WILLIAM K. SLATE, II
Clerk

8/27/73: Petition for rehearing filed.
9/ 4/73: Petition for rehearing and oral argument filed.
9/ 4/73: Brief of appellant in support of petition for rehearing or oral argument filed.
9/ 7/73: Order denying petition for rehearing filed.